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ABSTRACT

The Buckley Amendment, formally entitled the Family Educational Rights and Privacy Act of 1974, grants parents the right to review all records that schools maintain on their children, and to force the removal of any inaccurate or misleading data. Its major impact on educational research is linked to its provision requiring written parental permission prior to the collection or release of personal data to outsiders. The purpose of this paper is to discuss the chronology of legislation and judicial decisions relative to confidentiality of data and the release of research information, along with the implications each may have to educational research. Indepth attention is focused on the implications the Family Educational Rights and Privacy Act has for educational researchers. Finally, a discussion of what the future may hold for educational researchers is discussed. (Author/DEP)

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THE BUCKLEY AMENDMENT AND BEYOND: LEGAL IMPLICATIONS FOR RESEARCHERS

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Introduction

> Whenever the law . . . imposes special burdens on [someone], it does so on the ground that certain special facts are true of those individuals. In all such cases, therefore, there is a twofold task. First to determine what are the facts to which the special consequences are attached; second, to ascertain the consequences.[1]

It is understandable in this age of computerization and electronic information systems that citizens have become somewhat concerned about the right of privacy. Recordkeeping, one of the oldest activities of mankind, came under scrutiny in the sixties when electronics became the crux of storing and gathering information. With these new developments, it became necessary to enact legislation which would protect both institutions and individuals. No single phenomenon has been more disturbing to educational researchers recently than the precipitately devised legislation[2] known as the Family Education Rights and Privacy Act of 1974, more commonly referred to as the Buckley Amendment for its sponsor, Senator James L. Buckley of New York.

The purpose of this paper is to discuss the implications of the Buckley Amendment for educational researchers. In addition, a chronology of legislation and judicial decisions relative to confidentiality of data and the release of research information will be presented, along with the relationship of each to educational research. Finally, the implications this piece of legislation has for educational researchers will be examined. Before discussing the Buckley Amendment, there is a need to review the historical development of the concept of privacy. Such an investigation should put the Buckley Amendment and related matters into proper perspective.

Privacy and Its Evolvement

In writing the majority opinion for the Supreme Court in Griswold v. Connecticut, Justice Douglas made it clear that the "right of privacy is older than the Bill of Rights--older than our political parties, older than our school system."[3] Indeed, "zones of privacy" can be found marked off, hinted at, or groped for in some of our oldest legal codes and in the most influential philosophical writings and traditions.[4]

One of the earliest recordings on privacy is found in the Bible when Divine visitation precipitated feelings of shame. According to the Bible, Adam and Eve were directed not to eat from the tree of knowledge of good and evil. However, after they violated this particular directive, "the eyes of both were opened, and they knew they were naked; and they sewed fig-leaves together, and made themselves aprons."[5] Thus, the view that man's awareness of good and evil "is somehow by Divine ordinance, linked with a sense and a realm of privacy."[6] Since the incident in the garden of Eden, individuals, groups, and institutions have sought "to determine for themselves when, how, and to what extent information about them is communicated to others."[7] Privacy as a concept is rather difficult to define, because its meaning varies from person to person. There is agreement, however, that an effective right of privacy must be contingent upon an individual's ability to control information related to his person. Thus, the parameters of privacy can be said to encompass one's property, ideas, relationships and information which cannot be shared without his consent or a compelling public interest. Simply stated, the right of privacy rests upon a society's acceptance of man's need for control and limitation on that which controls his existence. However, as man's needs

change, society must continually reevaluate the legal protections it extends to such needs. Therefore, the ability to control the circulation of information becomes a power that is essential in maintaining social relationships and personal freedom.[8]

In essence:

> Privacy is one of the rubrics under which the persistent tensions between the natural drives for individual fulfillment and the intruding needs of society are categorized . . . .
>
> Modern science has introduced a new dimension into the issues of privacy. There was a time when among the strongest allies of privacy were the inefficiency of man, the infallibility of his memory, and the healing compassion that accompanied both the passing of time and warmth of human recollection. These allies are now being put to rout. Modern science has given us the capacity to record faithfully, to maintain permanently, to retrieve promptly, and to communicate both widely and instantly, in authentic sound or pictures or in simple written records, any act or event or data of our choice. Technology can now transform what participants believed were private experiences into public events.[9]

Growing concern at local, state and national levels is man's increased reliance on technology, particularly in the form of data banks which, as yet, are unregulated but which may contain unchecked errors, misinformation, or may be used in ways ultimately destructive to the private citizen, who may, in fact, be unaware that the information exists. Such data banks are kept on psychiatric and medical patients and are used increasingly to store data concerning students and others in the educational community. "In our recordkeeping civilization, the man whose name is not inscribed on the tab of someone's manila folder simply does not exist."[10]

A variety of information is available on any "person" one cares to investigate. Public inspection of individuals is not a terribly difficult procedure for a perceptive investigator and a little money can lead him

even further into the "annals of privacy." "Our increasing social interdependence assures an acceleration of the rate at which personal data are accumulated and stored."[11] This problem has now affected those working in educational institutions and will continue to be one of the major problems besetting contemporary man.

If causation is needed, one has only to examine the injurious effects of the inept actions of many members of the education profession and of society in general. The derogatory statements--or even untruths--perpetuated about students on their Cumulative Records or, at the university level, unsubstantiated negative letters of recommendation are cases in point. Other than the students and their guardians, information thus compiled has traditionally been available to any person or institution with a remotely legitimate interest.

Although there is agreement as to the constitutional basis of privacy, the ambiguity of the term has created some difficulty, historically. Thus, there is a need to examine the legal framework in which privacy exists.

Legal Setting on the Rights of Privacy: An Expanding Concept

> This development of the law was inevitable. The intense intellectual and emotional life and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the imposition of the legislature.[12]

The initial focus on the legal right of privacy in this country was advanced by Charles Warren and Louis B. Brandeis in an article entitled

"The Right to Privacy" in the December 5, 1890 issue of Harvard Law Review. In many ways, this article can be said to have provided the philosophical basis for the right of privacy, from which a legal framework has evolved. A measure of its impact on judicial reasoning can be found in finding that this article has been referred to in almost every case concerning the right of privacy.

The probe of judicial decisions revealed that the concept of privacy has been considered from two perspectives. For example, intruding upon one's right of privacy might be perceived as an encroachment upon one's private property and to some extent more willing, the damage done to a person when he finds that an advertisement is using his picture to promote a particular product without his permission "this may very well be something more than a simple misappropriation of something that belongs to him."[13] In essence, a perception of him has been presented to the public without his consent.

However, privacy as a judicial consideration dates back to the eighteenth century in England before being transported to America. In England the right of privacy or its equivalent in the sanctity of property commenced with personal correspondence. Simply stated, if one's correspondence was used by someone else without the owner's authorization, the courts held that the individual's property had been stolen, rather than his privacy invaded. This view is apparent in Pope v. Curl.[14] In this case a bookseller named Curl obtained some letters of Jonathan Swift and Alexander Pope, written by them or sent to them by someone else. Curl published these letters without the consent of the writers. The court held that the writer of a letter had a property right on his words. However,

letters written to an individual were not treated as the property of the receiver. Today, the courts are still searching for a balance "between the individual's right to the sanctity of his letters and society's right to and need of the events of privacy for the unfettered flow of legitimate historical information."[15] Continuing to articulate the principle set forth in Curl, the court concentrated its attention on Yovatt v. Winyard,[16] a case which concerned a veterinarian whose assistant, after setting himself up as a vet, used secret medical recipes that could have only been obtained from the vet surreptitiously. The Lord Chancellor ordered the former assistant to stop using the secret medicines because he had violated his previous employer's confidence and trust. The important point here is that the theft was of ideas, not things. In this case, ideas, reputation and name were all placed under the principle of property. In Prince Albert v. Strange and Others,[17] the last English case to be cited, Strange, a painter and printer, obtained some etchings made by Prince Albert and Queen Victoria. Supposedly, the Queen and Prince had practiced making printed impressions to amuse themselves and to share with selected friends. Prince Albert sought relief through the courts to have Strange return their etchings and copies of additional etchings and to prevent Strange from making further copies. Although the Prince and Queen had given copies of their etchings to friends and Strange had made them aware of the exhibit at which their etchings were to be sold, the court ruled in their favor. The importance of this case is not that the court prevented Strange from making copies, but that the court even denied him the right to describe the etchings in a catalogue, thereby expanding the framework in which the right of privacy exists.

The concept of privacy continued taking shape in America when the court recognized the need to prevent the public release of private facts, but made it clear that the invasion of privacy occurs, not with publication, "but . . . where the publisher should have known the publication would offend . . . a normal person."[18] Thus, the decision in Samuel v. Curtis Publishing Company relied upon the reasonable man standard.

One of the more significant cases in the evolution of the constitutional right of privacy is Griswold v. Connecticut.[19] The case concerned a state statute which prohibited the distribution of information about contraception. The court found this statute to be unconstitutional because it violated married couple's right to privacy. In addition, for the first time, the court made it clear that freedom from the invasion of privacy by the state is constitutionally protected. Although the decision in this case did not eliminate the ambiguity associated with the right of privacy, it has been instrumental in influencing future judicial thinking concerning privacy. Recently, through the courts' reliance on the due process clause of the Fourteenth Amendment, more structure has been given to establishing a definition for the right of privacy.[20]

Privacy: Controversy or Conflict in the Setting of the School

The recent concern about the invasion of privacy has caused the legislatures and judiciary to transfer the reasoning concerning the right of privacy into the setting of the school. This is understandable since "schools typically maintain extensive and intimate information about pupils and their families for legitimate educational purposes including instruction, guidance and research;"[21] such a compilation of information provides

the potential for the invasion of property. Student files contain both objective and subjective information ranging from parents' occupations to achievement scores. Therefore, the maintenance and dissemination of student information is crucial, especially when one considers how improper use and the increasing wide exchange of information can adversely affect the student's total existence. Consider that, historically, educators have operated on the assumptions that information is maintained with the student's interest in mind and is necessary if an adequate educational program is to be designed for the student. These assumptions have contributed to the imbalance between a student's right of privacy and the school's legitimate interest in knowing. The relationship that the need to know has with the overall privacy issue will be discussed later.

Issues associated with the school's need to know and a student's right of privacy were raised in Merriken v. Cressman.[22] This case provides an excellent entry into the discussion of judicial thinking concerning the right of privacy in the setting of the school. This case involved an eighth grade student and his mother, who brought suit against the school board and others. The parents contested a drug-abuse-prevention program (CPI) in which psychological testing took place to determine whether a student was a potential drug abuser or not. If test results revealed the student to be a potential drug abuser, he would be required to participate further in the program. The court made it clear that the good intent of the school board could not be used "without knowing, intelligent, voluntary and aware consent of parents or students."[23] The CPI program would also violate a family's right to privacy by "exercising the exclusive privileges of parents and using personality tests which raise questions concerning

family background and relationships"[24] without first obtaining the consent of properly informed parents. In conclusion, the court stated that maintaining information resulting from the tests in school files could cause a student "insurmountable harm from labeling."[25] Although the court recognized the individual's right of privacy in Merriken, "the issue of whether a parent can waive this right for his child was unanswered."[26] However, in balancing the individual's right of privacy with the legitimate interest of school systems "for the sake of public interest,"[27] the court decided that the chances were that greater harm would be done to the individual than to society.

Legislative Enactments, Common Law and Record Inspection

Due to growing extrajudicial interest, numerous states have laws and/or regulations which set forth procedures regarding the inspection and confidentiality of information maintained in student files. In accordance with state directives, many local boards of education have developed guidelines regulating the inspection of student records. Although most statutes and regulations "permit parental or student access to files under certain conditions,"[28] few court cases have addressed the issue of parental inspection. One of the few cases to address parental inspection was Van Allen v. McCleary.[29] In this case, a parent sought a court order directing the school board to permit him to inspect all the school records of his son. The board refused the demand and outlined its plan to keep the parent informed of his son's progress through report cards, private conferences with teachers, and if requested, interpretation of the pupil's personal file by qualified personnel. The parent, however, wanted to see the

written records and accused the board of concealment in order to cover up incompetency. The court concluded that:

> . . . no further citation of authority to recognize the obvious "interest" which a parent has in the school records of his child. We are therefore, constrained to hold as a matter of law that the parent is entitled to inspect records.[30]

Since such information could be beneficial in assisting a parent in fulfilling his duty as a parent, this right could only be restricted by legislative or constitutional limitations.[31] In Johnson v. Board of Education of the City of New York,[32] a similar case, the parents wanted the court to issue an order compelling the school board to permit inspection of the records prior to a particular trial. The board refused to allow the records to be inspected on the grounds that the parents should use the right to subpoena upon trial and that the records were confidential. The court held that under common law a parent has a right to inspect information contained in school records, under "proper" safeguards, and that the theory of confidentiality had no place in this case.

In Valentine v. Independent School District,[33] the court ordered the school board to issue a diploma and a transcript of grades to a student, even though the student violated the board's rule to wear a cap and gown at graduation. The court said the student had met all requirements for graduation, except for wearing the cap and gown, and so the board had a legal duty to issue both diploma and transcript. The student was seeking part of his own records and the court required the board to release the transcript and grant the diploma.

A California court ruled in Elder v. Anderson[34] that a student could recover damages if a school improperly, and in violation of statutory

directive, released information about him. In another California case, People v. Russell,[35] concerning forgery and false impersonation to obtain student records, the court held:

> There is a reasonable basis for college authorities to restrict public circulation of school records . . . that a person who attends a public school might be injured by the promiscuous circulation of this information . . . there remains a category of records in which the public as a whole has no interest.[36]

A Pennsylvania case[37] sustained the right of high school officials to make public to institutions of higher learning pupil records relating to nonacademic matters. The court stated:

> School officials have the right and, we think, a duty to record and to communicate true factual information about their students to institutions of higher learning, for the purpose of giving to the latter an accurate and complete picture of applicants for admission.[38]

In Pennsylvania Association for Retarded Children, et al. v. Commonwealth of Pennsylvania, et al.,[39] the United States District Court for The Eastern District of Pennsylvania ordered that regarding changes in the educational status of a child diagnosed as a slow learner or mentally retarded, the parents must be given notice of the tentative change, as well as the opportunity to have a due process hearing under the Equal Protection Clause of the Fourteenth Amendment. The notices shall inform the parent that he has the right " . . . to examine, before the hearing, his child's school records including any tests or reports upon which the proposed action may be based."[40]

In Wise v. Vincent Sauers and Directors of the Marple-Newtown Joint School District,[41] the plaintiff sought to have the record of her son's school suspension expunged from his permanent record. The son, Bennett Wise, repeatedly wore armbands imprinted with "strike" and "rally" during

the highly sensitive period of the American occupation of Cambodia and the Kent State incident in 1970. The principal, Dr. Sauers, did not object to a black armband or one imprinted with a peace sign, dove or omega sign; he did object to the words "strike" and "rally" since they could have contributed to disruption of the educational process. When Bennett refused to remove the armband, Dr. Sauers suspended him. The school board upheld Dr. Sauers' action. On June 29, 1972, the court ordered that the plaintiff's request was denied. The reasoning of the court was that the action was not related to "free speech" but was related to the potentially disruptive situation at the school at that time and to Dr. Sauers' responsibility to insure safety to all students.

The court held, in Citizens for Better Education v. Board of the City of Camden,[42] that student test scores are not to be part of a student's records. The citizens claimed that test scores were a matter of public interest and concern and that their release would enable the citizens to determine the educational achievement of students and efficiency of the educational program. The court agreed that the test scores were part of the student's permanent record, and that permanent record by state law is oper to persons with legitimate interest; and ruled that since parents' right-to-know is set forth in provisions of the state law, the school officials did not have the authority to release or withhold this information at their discretion.[43] In another case,[44] the court held that a board of education could deny a divorced father his daughter's forwarding address absent the danger of physical harm or abuse from the father.

In a different setting, a California court held that public disclosure of the names of officers and stated purposes of all student

organizations at a university "outweighted any minimal infringement of plaintiff's First Amendment rights."[45]

In rendering the foregoing decisions courts have struggled to establish parameters for protecting the right of parents concerning student records. If these court decisions have taught educators anything, it is that the law, like society, is ever changing.

The legal cases cited seem to indicate that parents have a legitimate interest to inspect the content of their child's file as long as proper safeguards are adhered to. The extent to which students have a right to inspect their files had not been addressed by the Supreme Court or Congress until the passage of the Buckley Amendment.

The Family Education Rights and Privacy Act: Present and Future

The Family Education Rights and Privacy Act of 1974[46] was law before its significance was realized. This act was amended to the Omnibus Education Bill and with little--if any--discussion was adopted by voice vote and approved in the House without debate. To the dismay of many it was never discussed in formal hearings, "to explore potential problems of, or reactions to, the subject matter,"[47] and the sponsor of the bill seems not to have been adequately prepared to respond to some of the controversial issues raised regarding the amendment. The focus of the amendment was so misunderstood that individuals in higher education did not analyze its effect until the bill had become law. Although earlier court decisions and legislation addressed some of the issues associated with student records, it was not until the passage of the Buckley Amendment that legislation was so comprehensive.

The act was passed August, 1974 and subsequently amended in part by the Library and Information Services Act in December, 1974.[48]

Basically this act outlines requirements which govern the access to student records by parents, students and other persons. The amendment, in short, penalized educational agencies by withdrawing federal education funds for failure to adhere to the provisions set forth in the act.

In addition, the amendment assures parents and emancipated students the right to review and inspect all official records, files and data directly associated with the student. Specifically, this includes all identifiable data, and is not necessarily limited to academic work completed, grades, standardized achievement tests, aptitude and psychological tests, interest inventory results, attendance data, health data, family background information, teacher or counselor ratings and observations, and verified reports of serious or recurrent behavior patterns. School officials, including teachers with a "legitimate educational interest," and school officials of other schools and school systems in which the student intends to enroll and selective others, have a right to see the records. The student's parents, or the emancipated student, if he is not under the guardianship of his parents, must be notified of a record transfer, receive a copy of the record if requested, and have the right for a hearing to question the records' content.

The act does not address counselor notes or student records kept by a teacher (but not part of the permanent cumulative record), but they probably are not covered by this act. However, when such information is routinely gathered and shared with school officials, the information probably comes under the act. An educational agency may not release

personally identifiable information concerning any other student unless (1) it has written consent from the student or his legal guardian, or (2) the school is under a court order or subpoena. The written consent must specify the records to be released, the person to whom the records are to be released, and the reasons for such release. If the school receives a court order or subpoena, the act provides that student, if emancipated, and the legal guardian must be notified of the order or subpoena before it complies. Finally, the act allows educational agencies to examine student records for the purpose of developing, validating and administering predictive tests, as long as the agencies do not permit the identification of students. Furthermore, all educational agencies are required to maintain a record indicating, by name, everyone who requested student records and what their interest was in seeing the records.

Another section of the Buckley Amendment frequently overlooked is section #439, an amendment introduced by Congressman Kemp that has important implications for educational researchers. This amendment states that:

> All instructional material, including teachers' manuals, films, tapes, or other supplementary instructional material which will be used in connection with any research or experimentation programs or project shall be available for inspection by the parents or guardians of the children engaged in such program or project. For the purpose of this section, research or experimentation program or project means any program or project in any applicable program designed to explore or develop new or unproven teaching methods of techniques.[49]

This amendment to the Family Educational Rights and Privacy Act though subsequently deleted may provide with some insight as to what the future may hold for educational researchers in experimenting with human subjects.

The Family Educational Rights and Privacy Act, Kemp Amendment and later revisions spelled out the requirements to be followed concerning the

release of information to those involved in research with human subjects. However, the Code of Federal Regulations[50] specified additional regulations for researchers conducting research with human subjects. Title 45 (Public Welfare), Part 46 (Protection of Human Subjects), which was passed even before the Buckley Amendment, specify additional guidelines for individuals engaged in research with human subjects. These regulations affect all institutions and agencies receiving grants and contracts from the Department of Health, Education, and Welfare for research projects involving human subjects and specify that inform consent must be obtained from all participating subjects, defined as the knowing consent of the participant or legal guardian without "undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion."[51]

On January 6, 1975, proposed regulations were published in the Federal Register under the title "Part 99: Privacy Rights of Parents and Students." These provisions still have not been finalized. Related federal legislation includes the Freedom of Information Act of 1974[52] and the Privacy Act of 1974.[53] The Privacy Act, passed approximately four months after the Buckley Amendment, focused on the protection of personally identifiable information collected on citizens by federal agencies. The Privacy Act presented four main requirements for federal agencies: limit the collection and maintenance of data, index and publish a guide to all record systems, grant access to record systems, and limit disclosure of information in a record system. Under this bill, all agencies are required to establish procedures to give individual citizens access to personally relevant records and to allow them to question the accuracy of the information. Disclosure of the data in a form not individually identifiable can

be made upon the written consent of the individual, for a purpose compatible with the purpose for which it was collected, to agency personnel who need the information for performance of their duties and for statistical research.[54] Although this bill has significant implications for research investigations among government agencies (law, police, and social security), it also has serious implications for educational research utilizing data banks of information, such as computerized file systems used in some states. For example, Maryland's system for learning disabilities of school children throughout the state is unavailable to parents, although the information was used by school authorities for decisions about school children.[55]

Implications of the Amendment for Educational Researchers: A Future Perspective

A careful glance at numerous studies in education, psychology or sociology will show that as a captive research population, elementary and secondary school students are used as the proverbial higher education sophomore as research subjects. The research methods commonly used "can be grouped into three broad types: first, self-description, elicited by interviews, questionnaires, and personality tests; second, direct observations and recording of individual behavior; and third, descriptions of a person by another serving as an informant, or the use of secondary data such as school . . . ."[56] This is not to suggest that these methods violate a student or parent's right of privacy, rather that researchers must take care to avoid improper methods. Until the Buckley Amendment,

public school children did not have to volunteer; they were there for the administration's asking.

The Buckley Amendment, or more accurately section #349, implies a considerable change in the indiscriminate use of students in educational research. A major concern for researchers emerges from the fact that federal funds will be withdrawn from educational institutions that provide identifiable information contained in student school records to any organization or individual who has a "legitimate educational interest."[57]

> There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.
>
> But though this proposition is not likely to be contested in general terms, the practical question, where to place the limit--how to make the fitting adjustment between individual independence and social control--is a subject on which nearly everything remains to be done . . . . Some rules of conduct, therefore, must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of law. What these rules should be, is the principal question in human affairs; but if we except a few of the most obvious cases, it is one of those in which least progress has been made in resolving.[58]

Since the primary purpose of the Buckley Amendment was to establish stringent controls on the accessibility of student records, researchers are required, in collecting such information, to obtain parental or student (if emancipated) consent to collect personally identifiable research data.

Interestingly there appears to have been little if any attention given to section #439, introduced by Congressman Kemp. Its wording is sufficiently vague upon inspection that, despite minutae that sounds impressive, it may contain booby traps for researchers in the future. For instance, specific reference is made to "instructional material" at the outset, which would appear to imply course material; however, the emphasis

on "Program or project in any applicable program designed to explore or develop new or unproven teaching methods and techniques" could apply to course materials alone only in the mind of the most narrowly education field-oriented professional. Clearly, th. explorations of the psychological, sociological, and physical factors of individual classes of students to develop appropriate materials for them apply here. As the public school systems become responsible for educating or training the complete range of the psychological, physical, and mental handicapped found in the human population, this is even more important. Though the spector of masses of parents descending upon the schools to "inspect" research materials strikes terror into the hearts of both educators and researchers, it is a possible interpretation of this paragraph.

However, neither this section nor the Buckley Amendment in general would seem to meet the objection that permission be asked before a child participate in any project. One is convinced that the research provisions in Buckley may not only apply to personally identifiable information, and section #439 simply does not address this point at all. One might, of course, have an entire project thrown out under the inspection provision, but this is different. The ghost of these controversies, however, will haunt educational personnel, and parental consent is more likely to be considered necessary in the future, regardless of the strict interpretation of these sections.

An area in which parental permission might be required is in the area of student research in the schools done as part of their graduate degree programs. This would clearly appear to be third party access in the spirit of Buckley, not falling under any of the research areas of

professional development and evaluation mentioned in section #348. As such the mere inspection of records or contact with students would appear to be sufficient to put this type of research in the third person category, and consequently require registration of the party and permission from the parent.

Aside from this category of researchers, it should be emphasized that most research done on school and college populations is not concerned with personally identifiable information which is the concern of the Buckley Amendment. Longitudinal studies following particular children are extremely rare, even outside the schools, for practical reasons having to do with the fact that such studies are expensive, time consuming, and usually present considerable problems in maintaining contact since both families and researchers move about the country a good deal at all levels of our society. At the other extreme, information extracted from personally identifiable cumulative records in general is in most instances considered to be of insufficient reliability for valid research. Where these efforts are made Buckley would seem to be saying that this does involve third party use and the need for registration and consent, as mentioned in the previous paragraph; subsection (b)(1)(A), however, would seem to exclude "in house" research from these provisions in total albeit politics might not.

Another area where the amendment may be exerting a pernicious effect on possible research, though inadvertently, is in the area of the destruction of records. The regulations clearly state that records may be destroyed as a matter of routine housekeeping, but that they may not be destroyed to prevent inspection where a request has been made. The vast

area of the destruction of records before a request can be made is thus overlooked in the amendment. Thus cumulative records have been stripped of the accumulated materials of the years, down to the most basic test and report information. The Student Development Department of one school system which used to put all its old material on microfilm (but, incidentally, would not release material over two years old to third parties at all) has now simply destroyed all files over two years old. This action, one presumes, is not unique. This will make impossible valid and valuable historical, psychological and social service research which could contribute vitally to improved services in the schools, in the clinical and child development picture, or in such things as the historical documentation of patterns of testing which produced race discrimination in the treatment of students. In other words, it would seem questionable that most research efforts actually come under the Buckley Amendment, strictly interpreted, either because they are provided for in the legislation or because they do not deal in personally identifiable information. However, schools react defensively, particularly at the elementary and secondary level where parents are more apt to make life extremely unpleasant. Such things as central screening committees are being set up to clear all research, and with approved projects, parents are at least notified and given the chance to withdraw their children from participation, even where positive consent is not asked.

Within the area of more sensitive material, i.e. that from confidential files, the provisions of Buckley regarding consent provisions for release of information were to a great extent already in effect because of considerations of good professional practice and because court decisions on

privacy and confidentiality had already led to some tightening of practice even before Buckley. However, it is still routine to secure a blanket permission for exchange of information, for instance, in medical, psychological and social work files. Technical violations of these provisions, however, in the sharing of information by telephone or case conference is rampant. The ACLU has also used this label regarding school-police relations vis-a-vis students, but these now clearly come under Buckley.

Briefly returning to section #439, that section which may be something of a dead letter, appears to have been intended merely as a sop to those who fear sex education, so-called dirty words, or the study of man/woman as one species of animal in the ecology, or, possibly, as a time bomb which may ultimately snare the unwary researcher or program developer. Even though the section would seem to open the door wider to public pressure against various "progressive" programs, one would also hope that at least some parents would be interested enough to want to know what is going on in their children's schools. Public pressure against courses usually forces the material to public view anyway, though usually at the course installation rather than the course development level. Schools could, of course, handle this by appointing course development committees with the participation of parents, so that prior general parental approval would be obtained. Extremists, or more especially "cranks," could then always be heard, but, in a sense, the System has already coopted the Enemy.

On the other hand, parents with objections might just have something valuable to contribute even if they are not specialists in other professional fields. Recently, I read of some early efforts at the development of inner-city based readers which were rejected by the students

out of hand as demeaning and debasing (and just plain prejudiced). If parental, or even student, participation has been secured here, these indigenous peoples' greater knowledge of inner-city culture, realities, problems and strivings would have saved much in professional time, effort, money and embarrassment, and in student time, satisfaction, and achievement. And, more importantly, it would have produced much better books.

One thing that seems to be overlooked in Buckley is that much of the delving into personal material to which parents and lawmakers are objecting takes place primarily through the medium of the evaluation of Federal programs. Section #438, subsection (b)(1)(A) and (3) of the Buckley Amendment specifically exempts these programs. Although the law provides for the destruction of the personally identifiable information when it has served its research purpose, copies of the original sheet are usually retained in the cumulative record of the individual child!

On the whole, the Buckley Amendment seems to be a valuable piece of legislation. As previously stated, it is fraught with pitfalls for mental health and medical personnel at the elementary and secondary level and the concession to University pressure in the matter of confidential letters of recommendation is regrettable and in some instances may exert unethical pressure on the student to waive his/her rights at just such points where disclosure may be desirable or vital for his/her protection.

As interpreted in the Regulations the amendment would seem to have little direct effect on educational research where personally identifiable information is not solicited or retained, except possibly in the area of research conducted by students; though section #439 subsequent to Buckley may well give some grounds for concern as it stands unelaborated by more

specific regulations. The relationship of Third Party researchers who use the schools for subjects in their own fields of research, for instance an Etwistle or Palermo in the field of linguistic development, is less clear since it is not specifically commented upon.

One of the serious deficiencies of the amendment is that it does not address the use of unobtrusive measures in educational research, such as participant-observation, or one-way glass for observing individuals without their knowledge. This leaves some very important questions unanswered, since the number of researchers using subjective measures has drastically increased over the past decade. For example, the sponsors of the Buckley Amendment failed to speak to the fact that there are situations in the school where the student whether he likes it or not will be under observation. Furthermore, students attending school "have to share their privacy with others." They must see others and be seen by them and therewith disclose something about themselves, even if the disclosure is involuntary. Therefore, researchers using observation techniques may not be invading the privacy of students if the student has left himself "open to the public eye."[59] The point is, if a researcher decides to record the behavior of an individual who is exhibiting a given behavior in public, does the researcher need the individual's consent? Students in a class are going about their day unaware that a researcher is tabulating their actions, so that he can complete a study he is doing. In this instance has the researcher violated the students' right of privacy?

Although the amendment does not directly address whether or not information obtained for one reason can be used for another, one should operate on the assumption that it can be used only for the stated purpose.

researchers which allege that their research is about one thing, but who intend to do something else are manipulative, if not unethical.

The amendment fails to distinguish between consent and anonymity of student information. "On occasion an individual may feel that his privacy is being invaded, . . . even though he remains quite anonymous to the researcher."[60] "So it . . . seem[s] that, wherever possible, both consent and anonymity should be sought in behavioral research."[61] The essence of the claim of privacy is the choice of the individual as to what he shall disclose or withhold, and when he shall do so.[62]

Informed consent was held a requirement for research involving human subjects as early as 1871. The Carpenter v. Blake[63] decision was based on the view that the doctor was obligated to act within the accepted methods of medical practice. Secondly, that he receive the permission from his patient to deviate from the accepted practice; such consent must be based on full disclosure of both the newness of the procedures and the possible hazards involved.

Several court cases dealt with the rights of institutionalized citizens who participated in experimental projects. In Wyatt v. Stickney,[64] a class action suit, the court recognized that being admitted involuntarily to an institution should not be determinative of patients' rights, therefore, those involuntarily committed patients unquestionably have a constitutional right to receive treatment which will provide the opportunity to improve or be cured. Wyatt v. Stickney II,[65] established that no distinction could be made between the mentally ill and the mentally retarded's constitutional right to receive adequate treatment. This includes freedom from treatment or experimentation without informed

consent. The basic elements of informed consent under these regulations include:

1. A fair explanation of procedures to be followed and their purposes, including identification of any procedures which are experimental.
2. Description of any attendant discomforts and risks reasonably to be expected.
3. Description of any benefits reasonably to be expected.
4. Disclosure of any appropriate alternative procedures that might be advantageous to the participant.
5. An offer to answer any inquiries concerning the procedures.
6. Instruction that the person is free to withdraw his consent and discontinue participation in the project at any time without prejudice to the subject.[66]

Perhaps the issue which will continue to have an impact on researchers rests in the balance against an educator's need to know and the individual's right of privacy. If educators are expected to carry out their duties as professionals they must have access to the information needed to perform effectively. On the other hand, such a need must not jeopardize the student's academic life nor his well being in society. Although clarity is lacking concerning what entails an educator's right to know about specifics regarding a particular student, this need to know provides one of the basic underpinnings governing the right of privacy in the schools.

Conclusion

> Unless the advances of sciences are used with discrimination by scientists engaged in behavioral research - as well as by other professions, . . . the constructive and productive uses of these advances may be drastically and unnecessarily restricted by a fearful community.[67]

If it is possible to envision what the future will be for educational researchers, one word will sum it up - hazy. That is to say, until

researchers develop guidelines which provide a balance between privacy and research, society will press for, if not bring about, such a balance. However, the research community should take the lead "through its own codes, its own attitudes, and its own behavior."[68] Otherwise, the legislature and the courts through statutes and judicial decisions will continue to establish guidelines governing privacy for researchers and all of society will suffer.

As technological improvements occur educational researchers will continue being placed in the position of defending that their actions do not invade the rights individuals have through legislation and common law. This pressure should increase simply because society will find itself struggling to protect an individual's right to privacy and the value the information has for society.

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